Supreme Court, U. S.
FILED
JUN 20 1977
MICHAEL RODAK, JR., CLERK

No. 76-1514

In the Supreme Court of the United States

OCTOBER TERM, 1976

JOHN J. CONSIDINE, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

JEROME M. FEIT,
ROBERT J. ERICKSON,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1514

JOHN J. CONSIDINE, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 550 F. 2d 693.

JURISDICTION

The judgment of the court of appeals (Pet. App. B) was entered on March 4, 1977. Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including May 3, 1977, and the petition was filed on May 2, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a person who is neither the target of, nor is overheard during a period of court-ordered telephone surveillance, has standing under 18 U.S.C. 2515 and 2518

to move for suppression of the intercepted communications.

STATEMENT

Following a jury trial in the United States District Court for the District of Massachusetts, petitioners were convicted of conducting an illegal gambling business, in violation of 18 U.S.C. 1955. They were sentenced as follows: Harvey Plotkin—a two-year suspended sentence, three years' probation, and a $5,000 fine; Lynch—a two-year suspended sentence, three years' probation and a $2,500 fine; Emerson, Bonnie Glixman, and Joseph Glixman—a one-year suspended sentence, two years' probation, and a $1,000 fine; Moccia, Silverman, and Considine—a one-year suspended sentence, three years' probation, and a $1,000 fine; Arthur Plotkin—a one-year suspended sentence, three years' probation, and a $5,000 fine. The court of appeals affirmed (Pet. App. A).

On June 1, 1971, a Department of Justice attorney applied for an order authorizing the interception of wire communications at a residence located at 63 Bickford Avenue in Revere, Massachusetts, averring that there was probable cause to believe that the telephones at this address were being used to conduct an illegal gambling business (Def. App. 167-170).[1] In a supporting affidavit, FBI Agent Orlin Lucksted stated that three confidential informants had related that petitioner Harvey Plotkin, Dominic Serino[2] and others were utilizing the telephones

[1]"Def. App." refers to the consolidated appendix filed by petitioners in the court of appeals. A copy of this appendix is being lodged with this Court.

[2]Serino was tried and convicted with petitioners in this case; however, his conviction was reversed by the court below and his case remanded to the district court for further consideration (see note 3, *infra*).

at the Bickford Avenue residence for illicit gambling purposes (Def. App. 179-183).

In addition, Agent Lucksted's affidavit also described the results of a 1970 court-ordered telephone surveillance directed against a gambling business operated by Anthony St. Laurent. During that surveillance, agents monitored more than 100 gambling related telephone calls, including one on July 27, 1970 between St. Laurent and a man identified as "Humphrey" that was set out in Agent Lucksted's affidavit (Def. App. 185-190). Subsequent FBI surveillance led agents to conclude that "Humphrey" was actually Dominic Serino (*id.* at 190). On December 20, 1974, an order was entered in the District of Massachusetts suppressing the communications intercepted in the surveillance of St. Laurent under *United States* v. *Giordano*, 416 U.S. 505. See *United States* v. *St. Laurent*, 521 F. 2d 506 (C.A. 1).

On the basis of Agent Lucksted's affidavit, the district court authorized the interception of communications over the telephones at the Bickford Avenue residence. The surveillance was carried out between June 3 and June 15, 1971, and all petitioners were overheard. Evidence obtained from this telephone surveillance, together with certain gambling paraphernalia seized at the residence pursuant to a search warrant, was introduced by the government in petitioner's trial for operating an illegal gambling operation in the Revere area.[3]

[3]Because he had been overheard during the illegal St. Laurent monitoring, the court below concluded that co-defendant Serino had standing, and remanded to allow Serino access to the transcripts of his conversations during the St. Laurent monitoring prior to a hearing to test "whether the illegal wiretaps so infected the other evidence set forth in the Lucksted affidavit that no independent basis for finding probable cause existed" (Pet. App. 19).

ARGUMENT

Since the petitioners were neither overheard during the St. Laurent surveillance, nor were targets of it, the court of appeals correctly held that they lack standing to challenge its legality. Petitioners concede (Pet. 6-7) that they are not "aggrieved persons" entitled to seek suppression of electronically intercepted evidence under 18 U.S.C. 2510(11) and 2518(10)(a),[4] and that they do not have standing to invoke the Fourth Amendment's exclusionary rule. Contrary to petitioners' contentions, nothing in 18 U.S.C. 2515[5] confers statutory standing on persons whose communications were not intercepted, and who were not targets of the interception. In defining an "aggrieved person" as anyone "who was a party to any intercepted wire

---

[4]18 U.S.C. 2510(11) defines an "aggrieved person" as

> a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed[.]

and 18 U.S.C. 2518(10)(a) further provides in pertinent part that

> [a]ny aggrieved person in any trial, hearing, or proceeding in or before any court * * * may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—
>
> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> (iii) the interception was not made in conformity with the order of authorization or approval.
>
> * * * * *

[5]18 U.S.C. 2515 provides in pertinent part:

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any * * * proceeding in or before any court, * * * if the disclosure of that information would be in violation of this chapter.

or oral communication or a person against whom the interception was directed" (18 U.S.C. 2510(11)), Congress intended to set forth "the class of those who are entitled to invoke the suppression sanction of * * * section 2518 (10)(a) * * *. It is intended to reflect existing law * * *." S. Rep. No. 1097, 90th Cong., 2d Sess. 91 (1968). Congress further explained (*id.* at 96):

> [Section 2515's sanction] must, of course, be read in light of section 2518 (10)(a) * * *, which defines the class entitled to make a motion to suppress. It largely reflects existing law. It applies to suppress evidence directly * * * or indirectly obtained in violation of the chapter. * * * There is, however, no intention to change the attenuation rules. See * * * *Wong Sun* v. *United States*, 83 S. Ct. 407, 371 U.S. 471 (1963). Nor generally to press the scope of the suppression role beyond present search and seizure law.

In *Alderman* v. *United States*, 394 U.S. 165, 175, this Court recognized that it is within Congress' power to "provide that illegally seized evidence is inadmissible against anyone for any purpose." However, this Court noted (*id.* at 175-176 n. 9):

> Congress has not done so. In its recent wiretapping and eavesdropping legislation, Congress has provided only that an "aggrieved person" may move to suppress the contents of a wire or oral communication intercepted in violation of the Act. * * * The Act's legislative history indicates that "aggrieved person," the limiting phrase currently found in Fed.

Rule Crim. Proc. 41(e), should be construed in accordance with existent standing rules.[6]

Given petitioners' concession that they were not "aggrieved" (18 U.S.C. 2518(10)(a)) or the "victim[s] of a search and seizure, one against whom the search was directed" (*Jones* v. *United States*, 362 U.S. 257, 261), they lack standing to contest the legality of the St. Laurent interceptions in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

JEROME M. FEIT,
ROBERT J. ERICKSON,
Attorneys.

JUNE 1977.

---

[6]Accord, *United States* v. *Scully*, 546 F. 2d 255, 268 (C.A. 9), certiorari denied, April 18, 1977 (No. 76-5918); *United States* v. *Armocida*, 515 F. 2d 29, 35 n. 1 (C.A. 3), certiorari denied *sub nom. Conti* v. *United States*, 423 U.S. 858; *United States* v. *Bynum*, 513 F. 2d 533, 534-535 (C.A. 2), certiorari denied, 423 U.S. 952; *United States* v. *Scasino*, 513 F. 2d 47 (C.A. 5); *United States* v. *Bellosi*, 501 F. 2d 833, 842 n. 22 (C.A. D.C.); *United States* v. *Gibson*, 500 F. 2d 854 (C.A. 4), certiorari denied, 419 U.S. 1106.